STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Court of Appeals
(Kelly, M.J., P.J., and White, H.N. and Wilder, K.T., JJ.)

ROGER MANN,
Plaintiff-Appellee,
vs.

SHUSTERIC ENTERPRISES, INC. d/b/a/
SPEEDBOAT BAR AND GRILL,
a Michigan Corporation,
Defendant-Appellant,

Supreme Court Docket
No. 120651

and

BADGER MUTUAL INSURANCE COMPANY,
a Wisconsin Insurance Company,
Defendant-Not Participating.

BRIEF ON APPEAL — APPELLEE

*** ORAL ARGUMENT REQUESTED ***

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Plaintiff-Appellee says, "No."
Defendant-Appellant says, "Yes."
The Court of Appeals said, "No."
The Trial Court said, "No."

II. IS THERE AN INHERENT INCONSISTENCY BETWEEN THE GENERAL PREMISES DUTIES OWED TO AN INVITEE UNDER SJI 2d 19.03 AND THE DUTY REGARDING ICE AND SNOW OWED TO AN INVITEE UNDER SJI 2d 19.05?

Plaintiff-Appellee says, "No."
Defendant-Appellant says, "Yes."
The Court of Appeals said "No."
The Trial Court said "No."

III DO SJI2d 13.02 AND THE LAW UPON WHICH IT IS BASED

(A) RELIEVE A DEFENDANT OF ITS PREMISES LIABILITY DUTIES (SJI2d 19.03) OWED TO A VOLUNTARILY INTOXICATED PLAINTIFF?

(B) IMPLY THAT PLAINTIFF'S PREMISES LIABILITY ACTION AGAINST THE DEFENDANT BAR THAT SERVED PLAINTIFF INTOXICATING LIQUOR ARISES FROM THE SELLING, GIVING OR FURNISHING OF ALCOHOLIC LIQUOR TO THE PLAINTIFF?

Plaintiff-Appellee says, (A) "No," and (B) "No."
Defendant-Appellant says, (A) "Yes," and (B) "Yes."
The Court of Appeals said, (A) "No," and (B) "No."
The Trial Court said, (A) "No," and (B) "No."

COUNTER-STATEMENT OF FACTS

This is a premises liability action. See 1b, Plaintiff's First Amended Complaint.

Testimony of Plaintiff, Roger Mann

Mr. Mann had been an employee of Great Lakes Steel for 38 years as a maintenance welder. 84b. On March 6, 1996, he arrived at the Speedboat Bar & Grill on the day in question close to 4:00 p.m. 85b. He drove there and parked in the back parking lot. 86b. At the time of his arrival he walked across the parking lot and it was snowing but not coming down hard at the time. 87b. There was ice and dirty snow that just about completely covered the parking lot with old snow. 88b. There were a few spots off to the side where you could see bare pavement. *Id.* In the bar he was with a group of five or six. 89b. At that bar he did not order food, but just drank. 90b. He ordered five or six drinks that evening. 91b. An additional two or three rounds were ordered by others in his group. *Id.* He himself bought probably two rounds. *Id.* He was drinking Royal Canadian and beer. *Id.* He had two or three beers that were in addition to the five or six drinks that he ordered. 92b. The drinks that he ordered were double shots. *Id.* He stated, "I had a pretty good glow on." 93b. He was feeling the effects of alcohol. 98b. Mr. Mann had been a drinker near four decades. He was treated in the past for alcoholic hepatitis and now had the beginning of liver cirrhosis. 100b.

He recalls that after he was in the bar for about an hour the snow outside started coming down pretty hard. *Id.* He was in the bar a little more than three to three and one-half hours. *Id.* He asked Billy Ponder to give him a ride home, *id.*, because, "I felt I had had enough." 94b. He walked into the parking lot alone, without realizing at first that Billy was no longer with him. 95b. The lot was completely covered by a thin coat of snow. 97b. It hadn't accumulated a lot. It was powdery. 99b.

About 20 feet or so into the parking lot, he fell, 96b, due to ice. 97b.

Pre-Trial Hearing

Prior to Trial, Plaintiff Roger Mann and Defendant Shusteric Enterprises, Inc., d/b/a Speedboat Bar & Grill submitted trial briefs. See Defendant's Trial Brief, 6b, and Plaintiff's Trial Brief, 10b. Plaintiff's trial brief requested the Court to give SJI2d 19.03, the general duties owed by a possessor of premises to a business invitee. Defendant objected. Defendant requested the Court to give SJI2d 13.02 under which a person impaired by drinking is held to the same standard of care as a person whose abilities have not been impaired by drinking. Plaintiff objected.[1]

The trial court addressed these requests and objections at a pretrial hearing on September 15, 1997.

Plaintiff requested SJI2d 19.03 on the ground that while the Plaintiff, Mr. Mann, was still in the Defendant's building, the Defendant knew or should have known that the Plaintiff was too intoxicated to discover or protect himself from the danger posed by ice and snow in Defendant's parking lot. 11b, 17b-18b. Plaintiff thereby argued that the general premises liability instruction applied. 68b.

The Trial Court ruled that all the instructions, SJI2d 19.03, 19.05, and 13.02, should be given. 74b.

In connection with SJI2d 19.03, the Court stated, *Id.*

> I think that the Plaintiff, on the other hand is entitled to the premises instruction, 19.03, including the paragraph in parens, the duty to warn. And I think it makes perfect sense that if the person is drinking in the bar that the bar is in some kind of situation to understand what kind of

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1 Plaintiff did not raise this on appeal. Plaintiff concluded the instruction was proper when understood as setting a standard of care for the Plaintiff's conduct that the jury may use to assess comparative negligence.

condition the man is in.

During the pre-trial hearing of September 15, 1997, Defendant raised its claimed dram shop issue, asserting that Plaintiff wished to argue that Defendant's duty to Mr. Mann arose from Defendant having served Mr. Mann alcohol. 71b. The trial court immediately corrected the Defendant stating, *id.*,

> Well, [Plaintiff] says that's not the reason. He says the reason is because he was drinking, whether you gave it to him **or somebody else did**. And I guess he's saying that you should have known he was drinking because you were serving him.
>
> * * *
>
> I don't think that gets you into the Dram Shop Act. That just gets you into your scope and knowledge. (Boldface added.)

Preliminary Instructions

Before testimony began, the Trial Court said, 79b, "the fact that they [the bar employees] were serving him [the Plaintiff] would go to their knowledge of whether or not they needed to warn him, whether or not he would make himself aware of dangers and protect himself because they would have the opportunity to observe him."

The Court stated, 80b.

> It's arguable that the bartender, bar whoever, bar personnel would know that if they're serving somebody that much that person may not be looking out for themselves. That's the argument that he's making. And I think that's appropriate.

Before proofs began, the Trial Court gave the jury this instruction, 81b.

> Now, I want to explain to you that this case is not about anything having to do with the serving of the drinks or the -- There is no claim of negligence in the serving of the drinks or in the drinking of the drinks.
>
> The claims of negligence here have to do with what happened **after the drinks were served and drunk.** O.k.? Alright.
>
> So, you are not here determining if the bar should have served him those

> drinks or if he should have drunk them. You're here determining what, **after those drinks were served** and he did drink them, **what were the duties of the bar to him**, did they breach **those** duties, were they negligent, was that a proximate cause of the accident and what was his duty to himself and did he breach that duty and was that a proximate cause of the accident. O.k.?
>
> In other words, what happened **after the drinks were served** and drunk. O.k.? Now, you may be looking back into the serving of that or the happening of that to see, to look for things that explain what happened later or to help you determine your case.
>
> But, we're **not here about fault in serving** or fault in drinking. O.k.? You understand that? O.k. (Boldface added.)

The Court then asked both counsel if they were satisfied with this instruction. 82b. Both counsel stated that they were. 83b.

Deposition Testimony of Billy Ponder

The deposition testimony of Billy Ponder was read to the jury. Mr. Ponder had worked with the Plaintiff, Mr. Mann on March 6, 1996. He and Mr. Mann decided to go to the Speedboat Bar after work. 101b. Ponder left work at about 3:30 p.m. separately from Mr. Mann. 102b. He picked up his girlfriend Mary and proceeded to the Speedboat Bar where he parked in their back parking lot. 103b. They walked across the parking lot to the bar. *Id.* He recalls that the parking lot "was snow covered, somewhat icy." 104b. In the bar Roger Mann and other friends from work were already present. *Id.* He observed that Mr. Mann had already been drinking. 105b. Ponder had arrived at the bar between 5:00 and 5:30 p.m. *Id.* Ponder also testified that he could tell Mr. Mann had been drinking. 106b. He observed Mr. Mann drink quite a few whiskeys and beers after he arrived. 107b.

Mr. Ponder described that there are windows near the front of the bar and on one side a large door wall, 108b, and a window behind the bar, 109b. While in the bar he became aware of snow flakes outside that gradually became snow and sleet as the night went on. 110b.

When he was leaving, he offered Mr. Mann a ride home, and Mr. Mann accepted. 178b. Mr. Ponder believed Mr. Mann was intoxicated. 111b. He observed that Mr. Mann was walking slowly.

112b. Mr. Mann walked out into the parking lot alone while Mr. Ponder was talking to another person. *Id.*

A few seconds later, Mr. Ponder left the bar and in the parking lot he found Mr. Mann "laying on his elbows" and "on his back." 113b. At the time the parking lot was "covered with snow and ice." 114b. Mr. Ponder walked cautiously taking small steps. *Id.*

Mr. Ponder testified that the parking lot was different from when he came into the bar originally. "It now all seemed to be snow filled." 116b. He saw no salt, ashes, fertilizer or anything that had been spread on the snow. 117b.

Mr. Mann had told Mr. Ponder that he slipped on ice. *Id.*

Mr. Ponder was unable to say whether or not Mr. Mann, from the position where he had been sitting in the bar, would have been able to see outside through the windows when it was snowing. 118b.

Mr. Ponder was going to take Mr. Mann home from the bar because Mr. Mann had had enough alcohol to drink and he could not drive on his own. 119b. Mr. Ponder believed that Mr. Mann asked him to drive him home because he was too intoxicated to drive home himself. 115b.

Deposition Testimony of Dr. Michael Baghdoian

The deposition of Dr. Michael Baghdoian was read to the jury. Dr. Baghdoian is an orthopaedic surgeon and received Mr. Mann in the emergency room at Seaway Hospital after the incident. 120b. Dr. Baghdoian described Mr. Mann's demeanor in the emergency room as, "well, he had alcohol on board. So he was, in my estimation, inebriated." 121b. Dr. Baghdoian was asked whether he considered the report in the hospital records indicating a 2.9 blood alcohol sera to be a high degree of intoxication and answered, "2.9 would be nearly 3 times the normal." *Id.* He further testified that Mr. Mann's appearance in the emergency room was consistent with that blood alcohol level. 122b.

Testimony of Mary Anne Cyr

On the day of the incident, Mary Cyr, a 7-year employee of the Defendant, went into work at 4:30 p.m. 123b-124b.

Other bar employees present that night were the bartender, Sandra Schmidt, and Mr. Rose, the cook. 125b.

If it were snowing or sleeting on the outside it was the cook who took care of it rather than the bar maids. 126b. Ms. Cyr recalled seeing Mr. Mann at the bar that night and serving him drinks. 127b. She denied realizing Mr. Mann was intoxicated. 128b. If she had realized it, she would have taken protective action toward him, which could include walking him through the parking lot to his car (with someone else driving, presumably). 129b.

If Mr. Mann had consumed 15 drinks that evening, she would have felt an obligation to take some action to protect him. 130b. Actions to protect him would have been to cut him off or call a cab. *Id.* She would have felt an obligation to do something. 131b.

She was the only person serving Mr. Mann alcohol. 132b.

Testimony of Sandra Anne Schmidt

On March 6, 1996, she was employed at the Defendant as a 4-year employee working from 6:30 p.m. to 2:00 a.m. 167b-168b. She was bartending. 169b. She was working with Nicholas Rose and Mary Cyr. *Id.*

She testified that when someone becomes intoxicated in the bar she looks out for that person, 170b, which may include walking them out to their transportation. 171b. It was the waitress's job to monitor people to make sure that if someone became intoxicated the proper steps were taken to protect them and others. *Id.*

Testimony of Kimberly Anne Ferrell

Kimberly Anne Ferrell is Roger Mann's daughter. 133b. At Seaway Hospital that evening she

saw her father at about 10:00 p.m. 134b. He was showing signs of intoxication. *Id.*

Testimony of Walter Nicholas Rose

Mr. Rose was employed by the Defendant as a cook between November of 1995 and June of 1996. 135b. He recalls the night Mr. Mann fell. 136b. When he got to work that day, at about 3:00 p.m., he went through the parking lot. 137b. Within the first hour at work he took the trash outside and recalls light snow, not bad. 138b. There were existing patches of ice in low lying areas of the parking lot. 139b. Toward evening it was blizzard like with **icy rain** and "everything falling." 140b. That was **before he heard that someone had fallen**. *Id.*

From the time that Mr. Rose saw the **sleet storm** and the **icy conditions** to the time Mr. Mann fell was at least one hour during which salt could have been spread, 141b-142b. Upon reflection, Mr. Rose believes there could have been a hazardous condition for the bar patrons going to the parking lot under those conditions. 142b.

Instructions Regarding Alcohol

Following the testimony of Mr. Rose, Juror Porter began to raise a question concerning the Court's earlier instruction regarding alcohol. The Court, 143b-145b, stated,

> THE COURT: (Interposing) I said that this was not a case about fault in terms of service. In other words, the bar is not being sued because they served him too much. That's not the claim.
>
> So, when you judge their negligence, **you're not judging it in terms of whether or not they served him too much**. In terms of him, you're not judging him in terms of whether or not he drank too much. That's not the claim.
>
> You're judging the case as to what happened **after he had whatever drinks** he had was anyone negligent in **the happening** of this accident?
>
> * * *
>
> THE COURT: Okay. Let me go over that again. You may be concerned with how much Mr. Mann drank, but you're not concerned with deciding whether he was at fault in drinking it.

> You are considering whether he was at fault **after he drank** it and what he did in terms of his own behavior, if he was negligent in bringing about his own injury.
>
> * * *
>
> THE COURT: Did that answer your question?
>
> JUROR PORTER: I think so. Yes.
>
> THE COURT: Alright. O.k. So, I want to clarify for the members of the jury that we **are not here to discuss whether or not the bar was at fault or negligent in serving those drinks** or whether Mr. Mann was at fault or negligent in drinking them.
>
> We are here to, for you to consider whether the bar was negligent in view of the service and the drinking in terms of causing the accident, in other words, **what happened after** and also the same for considering the Plaintiff's negligence in terms of how he conducted himself **after he had to drink** whatever he had to drink. Do you understand? O.k.

Defense counsel expressed satisfaction with the instruction subject to the rulings already made and the objections already noted. 146b.

Testimony of Robert Shusteric

Mr. Shusteric, the owner of the Speedboat Bar & Grill, testified that he **did not have any regular plan for taking care of ice and snow** at the bar. 147b-148b. At the time, Mr. Shusteric's handyman was not at the bar. **Nor was the manager, Tim.** 148b. There was **no one present** that evening while Mr. Mann was in the bar who was **in charge of the operation and of inspecting the outside of the premises and making sure there were no ice or snow hazards on the premises to patrons.** 148b-149b. Mr. Shusteric never gave employees any formal instructions in what to do if a storm like the one that occurred that evening arose. 150b-151b.

Testimony of Dr. David Schneider

Dr. David Schneider is an Associate Professor or Pharmacology at Wayne State University, School of Medicine, Department of Pharmacology. 152b. His testimony related to pharmacological kinetics, which is the body's absorption and distribution of a drug including its metabolism and excretion.

153b-154b.

Mr. Mann had a serum ethanol test performed at Seaway Hospital at about 9:00 p.m. the night of the incident. 155b-156b. Based on calculations and expertise he opined that at the time of the blood test, which measured serum alcohol level, Mr. Mann's whole blood alcohol level would have been 0.2 to 0.205. 157b. Dr. Schneider calculated that over the period from 4:15 p.m. to 7:15 p.m. in order to have the known alcohol level when tested, Mr. Mann would have had about 14 shots. 158b. The conservative estimate is 12-13 drinks. 159b. Dr. Schneider estimates that Mr. Mann's alcohol level between 7:15 and 7:30 p.m. was about 0.320 (serum) corresponding to a 0.240 whole blood alcohol level. 159b-160b.

12-13 shots corresponds to about half of a fifth of alcohol. 161b.

If Mr. Mann had been drinking throughout the evening, he would **not have been able to mask (his symptoms of inebriation) at all**. 161b-162b.

Testimony of Dr. Edgar Kivelia

Dr. Kivelia is a forensic toxicologist called by the Defendant. 163b. He testified that walking is not a complex behavior. If something happens to someone who is walking he would normally catch his balance. However, alcohol disables that ability. 164b.

He testified that where a person has 14 shots of 80 proof alcohol and three beers over a three-hour period and weighs 150 pounds, **he would not think that person is able to mask his intoxication.** 165b. He further testified that if a bar maid served a person 14 ounces of whiskey which is 86 proof he would expect **she is going to see even on a person who is a heavy drinker some effects as far as the alcohol is concerned**. 166b. He would further expect that she would be looking for them. *Id.*

Closing Arguments

In closing argument, Plaintiff's counsel explained how intoxication in this case is relevant. He said, "It is relevant because them [sic] serving him the intoxicants gave them the knowledge of how much

he had been served." 172b-173b.

In closing argument, Defendant stated with regard to Mr. Mann's condition on the evening of the incident as follows: "But the bottom line is that Mr. Mann was drunk." 174b.

Defense counsel Estes continued, *id.*,

> Yet he still can't face that and come forward and look at each of you, even though he's sworn to tell the truth and say yes. I was drunk that night. He's still trying to avoid saying that.
>
> And, of course, why does that happen? Why do we get this jumping from one foot to the other? Mr. Brittain says, Oh, the Defense is going to get up there and tell you that Mr. Mann was drunk and it's his drunkenness that's the fault of the accident. And he's correct. That's exactly what I'm telling you.

Defense counsel further argued the testimony of Dr. Kivelia that people who are intoxicated can't do more than one thing at a time. "So, if all I'm doing is thinking about walking, I might be able to do it. But when I'm distracted, now I've got a problem." 175b. He re-emphasized his point, "Again, it is Mr. Mann's intoxication which is the cause of this accident." 176b. He further said, "But there's a danger here because he is intoxicated." 177b.

Judgment

A judgment on Jury Verdict was entered on March 26, 1998. It reflected 50% comparative negligence.

Claims of Appeal

On or about April 8, 1998, Defendant filed its Claim of Appeal in the Michigan Court of Appeals. On May 11, 2001, the Court of Appeals issued its opinion affirming the jury verdict and also granting Plaintiff's cross-appeal for additur. On November 30, 2001, the Court of Appeals, on rehearing, denied Plaintiff's cross-appeal for additur. Plaintiff has not appealed that decision. The remainder of the Court of Appeals original opinion of May 11, 2001 was left intact.

On December 21, 2001, Defendant-Appellant filed its Application for Leave to Appeal from the

November 30, 2001 decision of the Court of Appeals. On December 11, 2002, this Court granted leave to appeal concerning Issues I and II in the Application for Leave. .1a.

On March 5, 2003, the Defendant-Appellant filed its Brief on Appeal in this Court. This Brief on Appeal of the Plaintiff-Appellee is herewith presented.

Plaintiff-Appellee disagrees with certain statements in Defendant-Appellant's Statement of Facts because they are not supported by evidence. These include: (1) that it was obvious to all customers in the bar that it was slippery outside. It is unknown who all the customers were and what they knew; (2) that it had been snowing and sleeting out all afternoon that day. It had not been. It was not when Mr. Mann arrived at the bar in the late afternoon; (3) that Mr. Mann knew the parking lot was covered with ice. He did not. He saw it covered with snow.

Defendant-Appellant's statement in its Argument I that Mr. Mann sat on a bar stool drinking as fast as he could with both hands for three hours is false and unsupported. Mr. Mann sat with others at a table.

Plaintiff-Appellee's Counter-Statement of Facts is presented to provide a balanced presentation of the facts.

INTRODUCTION

Premises and Dramshop.

This premises liability action arises independently from the dramshop act. To determine this, ask two questions: Would Plaintiff's premises action lie if there were no dramshop act at all, given that there is no common law action whose duty arises from the giving, furnishing or selling of alcoholic beverages? The answer is "Yes," and, therefore, Plaintiff's premises action may lie.

The second question to ask relates to the role played by Defendant's premises. Ask: Would Plaintiff have a premises action against the Defendant if his injury occurred after Plaintiff left the Defendant's land? The answer is "No."

The main constituents that give Plaintiff his cause of action are:

(A) His injury occurred on Defendant's land;

(B) He was Defendant's invitee;

(C) Defendant had knowledge of Plaintiff's diminished capability; and

(D) Defendant had knowledge that the condition of his parking lot posed an unreasonable danger to Plaintiff.

In this connection it matters little what Plaintiff's diminished capability is. It may be childhood, blindness or other physical infirmity, mental disability or temporary loss of capability due to intoxication.[2] If Defendant knows or should know of it, the Defendant's standard of care in the context of the invitor-invitee relationship can be affected. How the Defendant acquired or should have acquired the knowledge is of no import. In Mr. Mann's case the fact that Defendant served him alcohol is relevant to its acquisition of knowledge of Plaintiff's condition. The furnishing, selling and service of the alcohol alone

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[2] Whether or not Plaintiff's diminished capability is voluntary or involuntary has no bearing on Defendant's standard of care to be exercised regarding the Plaintiff. It does affect whether Plaintiff may himself be deemed negligent in causing his own injury. (Involuntary–no; voluntary–yes.)

gives rise to no duty of the Defendant. They are wholly collateral.

General Premises Actions and Ice and Snow Actions.

Where a case involves ice and snow and also other premises considerations that may affect an invitor's standard of care, both SJI2d 19.03 and SJI2d 19.05 may be read to the jury.

SJI2d 13.02, Premises and Dramshop

SJI2d 13.02 relates solely to a party's conduct for his or her own safety. In this case that party is the Plaintiff. The determination of the standard of conduct for which Plaintiff is held legally responsible does not affect the Defendant's premises duties towards the Plaintiff. Defendant's knowledge of Plaintiff's intoxication may affect the conduct required of the Defendant to meet its premises liability obligations.

There is no relationship between SJI2d 13.02 and the dramshop act because the Defendant's duties in this case are not based on the giving, furnishing or selling of alcoholic beverages to the Plaintiff.

ARGUMENT I

A DRAMSHOP MAY NOT RELIEVE ITSELF OF PREMISES LIABILITY DUTIES OWED TO CUSTOMER AS AN INVITEE MERELY BY THE ARTIFICE OF SERVING HIM OR HER INTOXICATING LIQUOR UNTIL THE CUSTOMER BECOMES DRUNK.

It has been well-established in Michigan that a dramshop's duties that arise independently from the unlawful sale of alcohol are not pre-empted or precluded by the Dramshop Act, MCL 436.22.[3] See statute at 19b. Manuel v Weitzman, 386 Mich 157, 191 NW2d 474 (1971); Millross v Plumb Hollow Golf Club, 429 Mich 178, 413 NW2d 17 (1987); Madejski v Kotmar, Ltd. 246 Mich App 441, 633 NW2d 429 (2001), lv den 465 Mich 884, 635 NW2d 315. The Supreme Court reviews statutory interpretation de novo. Cox v Board of Hospital Managers for the City of Flint, 467 Mich 1, 16, 651 NW2d 356, 363 (2002).

At common law, there was no tort based on selling or furnishing alcohol to an able-bodied person, even where that person became drunk and caused injury to himself or others. Manuel at 163, 191 NW2d at 476. The Dramshop Act created a statutory cause of action against dramshops where unlawful selling, giving or furnishing alcohol to a minor or visibly intoxicated person proximately causes damage, injury or death. MCL 436.22(4). There was, however, no intent to effect the common law duty of a dramshop to maintain a safe place of business for its customers. Manuel at 163, 191 NW2d at 476.

In Manuel, customer Manuel was attacked in a bar by customer Carrigan. Manuel sued on the Dramshop Act and premises liability. It was held that Manuel could proceed with his premises liability action even where he settled his dramshop claim. Manuel at 167-168, 191 NW2d at 477-478.

In Millross, Tomakowski was an employee of Plumb Hollow Golf Club. In that role, he attended

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[3] MCL 436.22, which applies to this case, has since been repealed and replaced by MCL 436.1801.

a scholarship dinner at the club where he was served several drinks. Afterwards, while driving home, he had a motor vehicle accident with another car driven by Millross, who died. Millross's widow brought a dramshop action against the golf club and also alleged common law negligence for the club's failure to properly supervise Tomakowski or provide him with alternative transportation home. The dramshop action was settled. Mrs. Millross wanted to continue against the golf club on the negligence claim. Millross held she could not, because she failed to state a claim that based on "breach of a duty cognizable at common law which is independent of the conduct involving the furnishing of intoxicants to Tomakowski." Millross at 194, 413, NW2d at 24.

Millross at 193-194, 413 NW2d at 24 affirmed that

> the Dramshop Act does not control or abrogate actions arising out of conduct of a tavern owner other than the selling, giving or furnishing of intoxicants, provided that the alleged unlawful or negligent conduct is in breach of **a duty recognized as a basis for a cause of action at the common law**. (Boldface added.)

Grace Madejski was the mother of Anna, a 19-year-old exotic dancer at a topless bar. While driving home from work, Anna died when her car struck a tree. She had a 0.26 blood alcohol level. The Dramshop Act, MCL 436.22(10), precluded a dramshop cause of action on behalf of Anna's estate or Grace Madejski, individually. Grace Madejski sued Anna's employer for wrongful death. She alleged that the bar allowed customers to furnish underage dancers with alcoholic drinks to diminish their inhibitions.

Madejski notes that a common law action distinct from the Dramshop Act may be brought if it is based on "a recognized duty at common law." Madejski at 446-447, 633 NW2d at 433.

The Dramshop Act, MCL 436.22(11), provides that it is "the exclusive remedy for money damages arising out of the selling, giving or furnishing of alcoholic liquor." This provision does not and did not preclude Mrs. Madejski's cause of action. The Court of Appeals stated, Madejski at 447, 663 NW2d at 433-434

> The distinction is that the *duty* breached, **but not necessarily the claim's factual basis**, must arise from something other than the unlawful furnishing of alcohol.
>
> * * *
>
> If Plaintiff has set forth a proper claim based on a duty under the common law, e.g., premises liability, negligent supervision or entrustment, inherently dangerous work activity, retention of independent contractor, failure to provide a safe place to work, then summary disposition is improper even though factual basis of the claim involves the unlawful furnishing of alcohol. (Italics supplied.) (Boldface added.)

Madejski at 448, 633 NW2d at 434 concludes

> The Dramshop Act did not confer on liquor retailers additional protections not accorded to others. [Millross] at 192, 413 NW2d 17.

Thus, as in Millross, supra, where the alleged negligence or other claim is not based on a duty distinct from the unlawful selling, furnishing or giving of alcohol, the claims were rejected by the courts. Jackson v KPM Corp.,[4] 430 Mich 262, 422 NW2d 657 (1988) (gross negligence, willful, wanton and reckless conduct); Browder v Int'l Fidelity Ins. Co.[5], 413 Mich 603; 321 NW2d 668 (1982) (contract claim); Rowan v Southland Corp.[6], 90 Mich App 61, 282 NW2d 243 (1979) (negligent supervision of liquor store employees who sold alcohol to minor).

In the instant case, the defendant bar's breach of duty occurred after Mr. Mann finished drinking. The duty is a premises duty owed by possessors of business premises to its business invitees.

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[4] In Jackson, intoxicated plaintiff injured in motor vehicle accident claimed gross negligence, willful, wanton and intentional misconduct, and reckless furnishing of intoxicants where bar knew plaintiff was a compulsive and habitual alcoholic.

[5] In Browder, plaintiff could not bring an action based on Dramshop Act violation under a contract theory against the bar's surety in order to obtain a six-year statute of limitations rather than the Dramshop Act's two-year statute.

[6] In Rowan, an action against a liquor store that sold beer to a minor could not be maintained on a theory of negligent supervision of its employees. Thus, Plaintiff's Complaint which failed to "name and retain" the minor, was dismissed. Here, the alleged negligence of the store resulted in the sale of beer to the minor.

Plaintiff Roger Mann did not allege a duty against the Speedboat Bar and Grill that arose from the selling, giving or furnishing of alcohol to him. Nor did Plaintiff allege breach of a duty that allegedly caused or resulted in him being sold, furnished or given alcohol. If Mr. Mann had done no drinking at the Speedboat, but had instead come into the Speedboat and purchased a package of cigarettes, and the Speedboat employee realized he was drunk, the bar would have owed him precisely the same duty based, in part, on its knowledge (1) of the condition of its parking lot and (2) an expectation that Mr. Mann would not protect himself against the condition. Indeed, if Mr. Mann had come into the bar already visibly intoxicated, and the bar refused to serve him any alcohol, he would still have his common law premises action against the bar. The same applies where the bar is replaced by any business held open to business invitees that does not serve intoxicants, as long as the other requisite conditions of knowledge and circumstance apply.

It is illogical and contrary to common sense that the Mr. Mann-who-did-not-drink-at-the-Speedboat can sue the bar, but the Mr. Mann-who-did-drink-at-the-Speedboat cannot. The Dramshop Act has never been construed to bring about such a topsy-turvy result.

There is nothing in the facts of this case that requires or suggests that the construction found in Manuel, Millross and Madejski of the exclusive remedy provision of the Dramshop Act is incorrect or inapplicable under the present facts.

ARGUMENT II

WHERE AN INVITEE IS OWED A PREMISES DUTY BASED ON ICE AND SNOW AND ALSO BASED ON NON-ICE-AND-SNOW CONDITIONS, A TRIAL COURT, ACTING IN ITS SOUND DISCRETION, MAY READ TO THE JURY BOTH SJI2d 19.03 AND SJI2d 19.05. IF THE TWO INSTRUCTIONS WERE INHERENTLY INCONSISTENT, THIS COULD NEVER BE DONE.

SJI 2d 19.03[7] (1994 amendment) states:

> A possessor of [*land/premises/a place of business*] has a duty to maintain the [*land/premises/place of business*] in a reasonably safe condition.
>
> A possessor has a duty to exercise ordinary care to protect an invitee from unreasonable risks of injury that were known to the possessor or that should have been known in the exercise of ordinary care.
>
> *(A possessor must warn the invitee of dangers that are known or that should have been known to the possessor unless those dangers are open and obvious. However, a possessor must warn an invitee an open and obvious danger if the possessor should expect that an invitee will not discover the danger or will not protect [*himself/herself*] against it.)
>
> *(A possessor has a duty to inspect [*land/premises/a place of business*] to discover possible dangerous conditions of which the possessor does not know if a reasonable person would have inspected under the circumstances.)

SJI2d 19.05[8] states:

> It was the duty of _____ (name of Defendant) to take reasonable measures within a reasonable period of time after an accumulation of snow and ice to diminish the hazard of injury to _____ (name of Plaintiff).

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[7] This instruction is now designated as M Civ JI 19.03.

[8] This instruction is now designated as M Civ JI 19.05.

Defendant's Position in the Court of Appeals

In the trial court, Defendant asked for the usual ice and snow instruction, SJI2d 19.05, but objected to the general premises instruction, SJI2d 19.03. 70b. The Plaintiff requested both instructions, "the general jury instruction, along with the ice and snow instruction, [which] covers the law for the jury here." 68b. The Trial Court concluded that "all the instructions requested by both parties should be given." 74b. These instructions included SJI2d 13.02.[9] In the Trial Court, Plaintiff objected to SJI2d 13.02, 68b, referencing the "intoxicated party instruction." On appeal, Plaintiff has not raised this as an issue because Plaintiff has concluded it was a proper instruction understood to relate solely to the conduct of the Plaintiff. It allowed the jury to find negligence on the part of Plaintiff based on his diminished capability that resulted from his voluntary intoxication. The Plaintiff may not use voluntary intoxication to excuse negligent conduct that results from the intoxication. Nor may he claim voluntary intoxication as an incidental circumstance and be required to conform his conduct only to that practiced by a reasonable intoxicated person.

The Trial Court concluded that the case involved ice and snow accumulation (SJI2d 19.05) and general premises duties (SJI2d 19.03) including the duty to warn. 75b.

> And I think it makes perfect sense that if the person is drinking in the bar that the bar is in some kind of situation to understand what kind of condition the man is in.

The Trial Court thus found a general premises situation existing inside the Defendant's building and gave SJI2d 19.03. The Trial Court saw the general premises situation. The Plaintiff was in Defendant's business premises inside a building. He had diminished capability. The Defendant knew or should have known of it. The Plaintiff was about to go outside into the Defendant's parking lot that

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[9] This instruction is now designed as M Civ JI 13.02.

is used by its business invitees. The Defendant knew or should have known—not merely that there was ice, snow and sleet residue in its parking lot—but also that the Plaintiff who was about to encounter it had diminished capability. Thus, the Trial Court found the Defendant had duties not merely with respect to "ice and snow" but an existing duty inside the building before Plaintiffs stepped outside to the parking lot.

The Trial Court concluded there is no inconsistency between SJI2d 19.03 and SJI2d 19.05. 76b. The reason is clear. Under these facts, the two standard instructions fulfill distinct aspects of the case, one outside the building in the parking lot and one inside the building where the Defendant knew or should have known of Mr. Mann's diminished capability.

The Court of Appeals also concluded the two instructions are consistent. Slip Op. 11/30/01, 42a.

> [W]e conclude that, in the light of the authority as summarized by the Supreme Court in *Riddle [v McLouth Steel Products Corp.*, 440 Mich 85, 485 NW2d 676 (1992)], the instructions are not inconsistent and the trial court's reading both instructions under the circumstances of this case does not warrant reversal.

The Court of Appeals noted that the Defendant-Appellant also argued in its Court of Appeals Brief that there is no inherent inconsistency between the duty to warn (as in SJI2d 19.03) and SJI2d 19.05. In its Court of Appeals Brief, 44b, Defendant stated,

> While the obligation to take "reasonable measures" may be satisfied by giving the invitee an appropriate warning or doing any of the other things as set forth in SJI2nd 19.03 that does not justify giving the additional instruction. SJI2nd 19.05 says it all! Giving both instructions, as was done here over Appellant's objection, confuses the jury.

The Defendant-Appellant's view, therefore, was that whatever is said by SJI2d 19.03 is already included in SJI2d 19.05. Defendant-Appellant argued that giving both instructions "confuses the jury." Defendant-Appellant then asserted, *id.*, 44b-45b, that the Trial Court's instructions "expanded the scope" of Defendant's duty, but never stated what the expansion is. Defendant-Appellant then explained that the jury would be confused because the jury was told that fulfillment of the duty of SJI2d 19.05 is

"insufficient as a matter of law." *Id.*, 45b. Yet, nowhere did the Trial Court ever instruct the jury that fulfillment of SJI2d 19.05 alone was insufficient.

In its Court of Appeals Brief, Defendant never argued that SJI2d 19.03 and SJI2d 19.05 were inherently inconsistent.[10] Defendant's Court of Appeals Brief, 42b-43b.

A claim of instructional error is reviewed de novo. To warrant reversal the error must result in such unfair prejudice that a failure to vacate the jury verdict would be inconsistent with substantial justice. Cox at 8, 651 NW2d at 360.

Inherent Inconsistency?

Now, Defendant-Appellant says, "Ice and snow cases are never 'duty to warn' cases" because the dangers posed by ice and snow accumulations in Michigan are open and obvious. See Defendant-Appellant's Brief on Appeal, p. 29. Defendant-Appellant has raised no other claim of inconsistency between SJI2d 19.03 and SJI2d 19.05.

The issue before the Court now becomes whether the language of SJI2d 19.05 logically entails that the possessor never has an affirmative duty to warn.

The Defendant-Appellant raised an open-and-obvious argument for the first time in its Motion for Rehearing in the Court of Appeals, 55b. There, Defendant-Appellant argued that Quinlivan v Great Atlantic & Pacific Tea Co. Inc., 395 Mich 244, 235 NW2d 732 (1975) "does not recognize a duty to warn," Defendant's Court of Appeals Motion for Rehearing, 54b; that Beals v Walker, 416 Mich 469, 331 NW2d 700 (1982), is not good law; and that natural accumulations of ice and snow are open and

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[10]In its Brief on Appeal in the Court of Appeals, 42b, the Defendant argued that SJI2d 19.03, 19.05 and 13.02 are inconsistent, but made no argument that SJI2d 19.03 and 19.05 alone, are inconsistent, even under the facts. Defendant's argument in its Court of Appeals Brief was that giving SJI2d 19.03 in addition to SJI2d 19.05 was not justified. Defendant's Court of Appeals Brief, 44b.

obvious hazards for which there is no duty to warn. In its Court of Appeals Motion for Rehearing the Defendant-Appellant injected into this case for the first time a question regarding openness and obviousness of the hazards posed by natural and ice and snow accumulations.[11]

It was improper for the Defendant-Appellant to raise the issue in the Court of Appeals when it was not an issue in the Trial Court. In Wood v Weimar, 104 US 786, 795, 26 L Ed 779 (1881), the United States Supreme Court said,

> The rule is universal that nothing which occurred in the progress of the trial can be assigned for error here, unless it was brought to the attention of the court below, and passed upon directly or indirectly.

Similarly, Michigan has held that questions not raised in the Trial Court will not be reviewed. Waterman v Waterman, 34 Mich 490, 491 (1876). However, the Supreme Court may allow an issue to be raised for the first time on appeal if its consideration is necessary to a proper determination of a case. Sands Appliance Services v Wilson, 463 Mich 231, 239, 615 NW2d 241, 246, n.5 (2000).

Thus, if there is no inherent inconsistency between SJI2d 19.03 and SJI2d 19.05, the Supreme Court should not review issues raised by Defendant for the first time on appeal.

The Defendant-Appellant has worked hard in its Brief on Appeal to try to establish some inconsistency between SJI2d 19.03 and SJI2d 19.05. Yet, Defendant-Appellant has wrought no inconsistency.

At (p. 25) 179b, of their Brief on Appeal, the Defendant-Appellant states that "an inherent tension" exists between SJI2d 19.05 and "other defective premises situations under former SJI2d 19.03 in which 'an open and obvious' danger is present." It is not clear what the Defendant-Appellant is saying. The language suggests a tension between ice and snow stiuations and non-ice-and-snow premises

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[11] Open-and-obvious danger was not an issue in the trial court. Both Mr. Mann, 97b, and Mr. Ponder, 116b, testified that the ice in the lot at the time was covered by snow. Mr. Mann said it was powdery snow. 99b.

situations that are open and obvious; however, Defendant never explains or analyzes the contention further. It is likely just an inaccurate expression of Defendant's intended meaning.

Inherent means "existing in someone or something as a permanent and inseparable element, quality or attribute." Random House Dictionary of the English Language, 2nd Ed., Unabridged, 1987; Random House Webster's Unabridged Dictionary, 2nd Ed., 1998. Thus, an inherent inconsistency may not be one contingent upon the particular facts. The inconsistency must inhere in--be a basic, intrinsic and essential part of--the very words of the two jury instructions.

The Defendant-Appellant asserts that a warning instruction plus SJI2d 19.05 entails a contradiction because "Ice and snow cases are never 'duty to warn' cases" since everyone knows the dangers and what to do to reduce the perils. Defendant-Appellant's Brief on Appeal, (p.29) 181b.

The construction of this argument by Defendant-Appellant is problematic. It leads to the elimination of all negligence actions favoring invitees and licensees based on ice and snow. If the hazards of ice and snow in Michigan are always open and obvious, then they are always reasonably safe unless there are special aspects rendering them not reasonably safe. Lugo v Ameritech Corp., 464 Mich 512, 517, 629 NW2d 384, 386 (2001). If there are such special aspects, then, under SJI2d 19.03, the duty to warn remains. Thus, if on account of openness and obviousness there is never a duty to warn, then all ice and snow conditions in Michigan are reasonably safe and no possessor of land ever has a duty to act for the care and protection of his invitees or licensees. See Millikin v Walton Manor Mobile Home Park, Inc. 234 Mich App 490, 495, 595 NW2d 152, 156 (1999) in reliance on Riddle, supra, and Bertrand v Alan Ford, Inc., 449 Mich 606, 537 NW2d 185 (1995), holding the open-and-obvious doctrine applicable to the duty to protect regardless of whether the Plaintiff has alleged a duty to warn.

The argument of the Defendant-Appellant leads to total inapplicability of SJI2d 19.05 at all times for all cases.

Defendant-Appellant's position is bizarre. It appears to request this court to reverse Quinlivan. Defendant-Appellant's Brief on Appeal, (p.28) 180b.

Quinlivan at 261, 235 NW2d at 740 rejected the idea that "ice and snow hazards are obvious to all and therefore may not give rise to liability." Quinlivan based this on Kremer v Carr's Food Center, Inc., 462 P2d 747 (Alaska, 1969) which found that the prevalence of ice and snow conditions even in Alaska cannot work to insulate land possessors from liability to invitees based on ice and snow conditions. Quinlivan at 260, 235 NW2d at 740. Quinlivan, *id.*, quoted Kremer, 462 P2d at 752, as saying

> Nor do such climatic conditions negate the possibility that the possessor should have anticipated harm to the business invitee, despite the latter's personal knowledge of the dangerous snow and ice conditions or the general obviousness of such conditions.

Quinlivan addressed the duties owed to an invitee. At 260, 235 NW2d at 740, Quinlivan grounded its decision on the "rigorous duty owed an invitee" as expressed in cases such as Torma v Montgomery Ward & Co., 336 Mich 468, 58 NW2d 149 (1953). That duty includes the duty "of maintaining the premises in a reasonably safe condition and to exercise due care to prevent and obviate the existence of a situation known to it or that should have been known, that might result in injury." Torma at 476, 58 NW2d at 153. The facts underlying Torma included the presence of ice and/or snow at the entrance of a store. Quinlivan at 256, 235 NW2d at 738 observed that the natural accumulation rule which insulates land possessors from liability for natural accumulations of ice and snow, had never been harmonized or reconciled in Michigan with "the rigorous duty which the law recognizes as owed an invitee." Quinlivan ruled that the natural accumulation rule was inapplicable in the context of an invitor and invitee. 395 Mich at 260, 235 NW2d at 740.

Quinlivan at 258, 235 NW2d at 739 quoted approvingly from Littlejohn, Torts, 1974 Annual Survey Mich Law, 21 Wayne L Rev 665, 678 (1975), which stated

> The liability of an owner or occupier should not be determined solely by the condition of the premises, natural or artificial, but rather by the occupier's conduct in relation to those conditions—that is, considering **all of the circumstances**, was due-care exercised. (Boldface added)

"All of the circumstances" may, in a particular case, go beyond the direct consideration of only ice and snow. It may, as in the instant case, involve circumstances inside the Defendant's building, the Defendant's knowledge of Plaintiff's diminished capability, and the assessment of whether to take measures to protect the Plaintiff from foreseeable injury even while the Plaintiff is still inside the building. Such measures may include giving an appropriate warning, advice or instruction.

Quinlivan concluded at 261, 235 NW2d at 740 that the rigorous duty owed an invitee in ice and snow cases was "to exercise reasonable care to diminish the hazards of ice and snow accumulation." Quinlivan did not rule out the potential need to warn. It also did not rule out that the other attendant circumstances in a particular case would make it appropriate to instruct the jury on the duty owed where there is ice and snow and on the duty owed arising from the circumstances inside the Defendant's building. Where the circumstances inside the building and the ice and snow outside the building, on Defendant's land contiguous to the building, coalesce to produce injury, it may be proper to read to the jury both SJI2d 19.03 and SJI2d 19.05.

When an applicable and accurate standard jury instruction has been properly requested by a party, "it shall be given by the Trial Court, if the Court, in its discretion, gives an instruction at all on the general subject covered by the requested SJI." Johnson v Corbet, 423 Mich 304, 326, 377 NW2d 713, 723 (1985). See MCR 2.516(D)(2). Nonetheless, there is no requirement to read every such standard jury instruction. It is subject to the Trial Court's discretion. Where a standard or model jury instruction would confuse or necessarily distract the jury, unduly emphasize potentially prejudicial evidence or add nothing to provide fair and balanced instructions, the Trial Court may assess the "personality" of the case to

decide whether to give the instruction. *Id.* at 327, 377 NW2d at 723-724. In these regards, the Trial Court does not abuse its discretion unless its decision is "inconsistent with substantial justice." *Id.* at 327, 377 NW2d at 724; Case v Consumers Power Co., 463 Mich 1, 6, 615 NW2d 17, 19-20 (2000); MCR 2.613(A).

Warning is a Traditional Duty in Ice and Snow Cases

It is difficult to understand how it may be contended that ice and snow cases never merit a duty to warn. Plaintiff has found no case law in support. On the other hand, many cases recognize a duty to warn in ice and snow cases, particularly where the duty owed is the marginal duty of care owed to a licensee.

White v Badalamenti, 200 Mich App 434, 437, 505 NW2d 8, 9 (1993), a case involving a slip on ice, held

> A possessor of land is liable for injuries to a licensee caused by a condition on the land if the possessor has reason to know of the condition, should realize that it involves an unreasonable risk of harm, should expect that licensees will not discover the danger, and fails to exercise reasonable care either to make the condition safe or **to warn** licensees of the danger. (Boldface added.)

Altairi v Alhaj, 235 Mich App 626, 637-638, 599 NW2d 537, 542 (1999), which involves a slip and fall on accumulated ice and snow on front steps of a house, also recognized such a duty and noted at 638-639, 599 NW2d at 543 that, "The proper inquiry focuses on the parties' knowledge of the danger."

Burnett v Burner, 247 Mich App 365, 373, 636 NW2d 773, 778 (2001) found that the duty owed to a licensee is limited to a duty to warn, provided that other necessary conditions exist.[12]

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[12] Burnett analyzed Restatement 2d Torts, §342, which Michigan adopted in Preston v Sleziak, 383 Mich 442; 453, 175 NW2d 759 (1970), overruled in part regarding public invitees by Stitt v Holland Abundant Life Fellowship, 462 Mich 591, 603, 614 NW2d 88, 95 (2000). Burnett held that Restatement 2d Torts §342 B which refers to a duty "to exercise reasonable care to make the condition safe, or to warn the licensee" requires only a duty to warn. Burnett's analysis which resolves the alternative duty appearing in Restatement 2d Torts §342 B into the

White, Altairi and Burnett all involve ice and snow. If even the marginal duty owed to a licensee may require a duty to warn, then surely the rigorous owed an invitee may, also. Beals at 480, 331 NW2d at 704 explicitly recognized that an invitee may be owed a duty to warn in an ice and snow case.

In this connection, at n.8, Beals quoted Quinlivan's quotation from Kremers that

> What acts will constitute reasonable care on the part of the possessor of land will depend on the particular variables of each case.

Beals, then, says that the particulars of a case may require a duty to warn. Beals relies for this on Quinlivan. Quinlivan implicitly recognizes an invitee may be owed a duty to warn in an ice and snow situation so long as the concept of "reasonable care" in ice and snow cases may be understood to include the possibility of warning. The Defendant-Appellant in its Brief on Appeal, (p.30) 182b, argues that "reasonable measures within a reasonable time, after the accumulation of ice and snow" cannot ever include a duty to warn. This is contrary to the position Defendant-Appellant took in the Court of Appeals. See this Brief, supra, p. 21.

The duty owed by a land owner to an invitee was expressed recently by this Court in Stitt v Holland Abundant Life Fellowship, 462 Mich 591, 597, 614 NW2d 88, 92 (2000) as follows:

> The land owner has a duty of care, **not only to warn** the invitee of any known dangers, but the additional obligation to also make the premises safe, which requires the land owner to inspect the premises and, depending upon the circumstances, make any necessary repairs or warn of any discovered hazards. *Wymer [v Holmes*, 492 Mich 66, 71, n.1, 412 NW2d 213 (1987)]. Thus, an invitee is entitled to the highest level of protection under premises liability law. *Quinlivan v. Great Atlantic & Pacific Tea Co., Inc.*, 395 Mich 244, 256, 235 NW2d 732 (1975). (Boldface added.)

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single duty to warn is questionable (since it seems to have treated "or" as being "and"), but is not an issue in the instant case.

In this general expression of the duty owed to a land owner to an invitee, this Court recognized that a duty to warn may exist without any exception made for cases involving ice and snow accumulations.

In short, it is simply false that an ice and snow case can never require a duty to warn. A duty to warn, as expressed in Stitt, supra, can apply to ice and snow situations involving an invitee. Consider the following example.

> On a cold January day, Mr. H parked his car along the west side of his favorite fast food restaurant, The T. He walked to the sidewalk immediately adjacent and parallel to the west side of the building. The sidewalk was clear of ice and snow and was dry. He walked briskly in a southerly direction on the sidewalk toward the southwest corner of the building where the sidewalk turned to his left (east) and ran along the south side of the building to the entrance door at the east end of the building, at the southeast corner. Unbeknownst to Mr. H., The T Restaurant had failed to clear snow and ice that had accumulated on the sidewalk immediately next to the south side of the building, just around the corner that Mr. H was approaching. Mr. H could not see the ice and snow until he rounded the corner. However, at that point, he could not avoid the ice and snow because he was walking at a brisk pace. Mr. H slipped and was seriously injured.

In this example, Mr. H used the path provided by The T. The path appeared clear, dry and safe. The danger was not observable to anyone using the path in the manner that Mr. H used it. This manner was one of the manners that the restaurant intended and expected customers to use. In this case, it is appropriate for a Trial Court to find that the T Restaurant had a duty, among others, to warn Mr. H of the ice on its southern sidewalk, because The T Restaurant should have expected and foreseen that a customer would use the path followed by Mr. H and not discover the danger in time.

Under the facts of the instant case, there was evidence of Plaintiff's diminished capability, the Defendant's actual or imputed knowledge of it, Defendant's knowledge of the dangerous condition of its parking lot and Defendant's failure to diminish the hazard in its lot despite having had reasonable time to do so. Under these circumstances, the Defendant can be found to have a duty to warn, instruct, or

protect the Plaintiff even while Plaintiff was still inside the building. Therefore, the Trial Court acted within its proper discretion in reading SJI2d 19.03 to the jury.

Defendant's duty to act arises in part from its anticipation that the Plaintiff's diminished capability will cause him to not protect himself.

Defendant offers the argument that SJI2d 19.03 and 19.05 are "mutually exclusive," Defendant-Appellant's Brief on Appeal, (p.25) 179b, pointing to the *Note on Use* at SJI2d 19.05. It states that SJI2d 19.05 should be used in ice and snow cases instead of SJI2d 19.03. Defendant-Appellant misinterprets the usage note. It is properly understood as not precluding SJI2d 19.03 in addition to SJI2d 19.05 where a possessor's premises duties involve more than just ice and snow. A Trial Judge's duty is to properly inform the jury of the applicable law. As stated in Burnett at 375, 636 NW2d at 779

> Jury instructions "should include all the elements of the plaintiff's claims and should not omit material issues, defenses, or theories if the evidence supports them." *Case, supra* at 6[, 615 NW2d 17 at 19-20].

The applicable law regarding warning is accurately stated in SJI2d 19.03.

> A possessor must warn the invitee of dangers that are known or that should have been known to the possessor unless those dangers are open and obvious. However, a possessor must warn an invitee of an open and obvious danger if the possessor **should expect that an invitee will not discover the danger** or **will not protect*[himself/herself]*.** (Boldface added.)

Kroll v Katz, 374 Mich 364, 373, 132 NW2d 27, 31-32 (1965), quoting Prosser, Torts, 2d Ed., p. 459, summarizes

> The occupier is not an insurer of the safety of invitees, and his duty is only to exercise reasonable care for their protection. **He must not only warn** the visitor of dangers of which he knows, but must also inspect the premises to discovery possible defects. There is no liability, from harm resulting from conditions from which no unreasonable risk was to be anticipated, or those which the occupier did not know and could not have discovered with reasonable care. The mere existence of a defect or danger is not enough to establish liability, unless it is shown to be of such a character *or* of such duration that the jury may reasonably conclude that due care would

have discovered it. (Italics supplied.) (Boldface added.)

Conclusion Regarding Issue II

Adoption of Defendant-Appellant's position would abolish actions based on ice or snow by an invitee against a possessor of land. It would be legal error to ever read SJI2d 19.05 (now designated M CI JI 19.05) to a jury. Defendant-Appellant has taken a position whose effect asks the court to reject the very jury instruction it requested and, on appeal, supported. Defendant-Appellant's position is internally inconsistent.

On the other hand, if Defendant-Appellant holds that there may be ice and snow premises liability actions and SJI2d 19.05 applies where the condition poses an unreasonable risk of injury then there may also be, in an appropriate case, a duty to warn. See example, supra, p. 29, concerning Mr. H had The T Restaurant. In such case, no inherent inconsistency exists between SJI2d 19.03 and 19.05.

Further, it is clear that where there exist both ice and snow conditions and other additional premises liability conditions, they may act together to produce injury. In such case, both SJI2d 19.03 and 19.05 may be applicable in the discretion of the trial court.

ARGUMENT III

SJI2d 13.02 RELATES SOLELY TO THE CONDUCT OF THE INTOXICATED PARTY AND NOT TO THE NON-INTOXICATED PARTY. IT NEITHER INCREASES NOR DECREASES THE CONDUCT REQUIRED OF A NON-INTOXICATED DEFENDANT TOWARD A VOLUNTARILY INTOXICATED PLAINTIFF, THOUGH DEFENDANT'S KNOWLEDGE OF PLAINTIFF'S INTOXICATION MAY.

The short answers to Issues III (A) and III (B) are:

(A) No, SJI2d 13.02 does not relieve Defendant of its premises duties because SJI2d 13.02 applies solely to Plaintiff's conduct and the standard of care to which Plaintiff is held for his own safety. It does not affect the Defendant's standard of care toward the Plaintiff. Defendant's knowledge of Plaintiff's diminished capability can affect the Defendant's standard of care toward Plaintiff.

(B) No, it does not imply that a premises action may convert into an action arising out of the serving, furnishing or selling of alcoholic liquor because the words "arising out of" in MCL 436.22(11) (exclusive remedy provision of the dramshop act) refer to the serving, furnishing or selling of alcohol as the source or basis of Defendant's duty. Here, Defendant's duty arises from (1) Plaintiff being on Defendant's premises or land as an invitee, (2) Defendant's knowledge of Plaintiff's diminished capability regardless of how Defendant may have acquired the knowledge and (3) Defendant's knowledge of the danger to Plaintiff. In particular, Defendant's duty ends when Plaintiff leaves Defendant's premises and land.

Issue III(A) requires the determination of the scope of applicability of SJI2d 13.02.

By its language, it applies to the conduct of a voluntarily intoxicated party. Here, in the instant case, that is the Plaintiff. The instruction provides that the standard of conduct to which the Plaintiff is held is that of a reasonable sober person. This means that if Plaintiff acts negligently as a result of his voluntary intoxication, he may not claim relief from the legal effects of his own negligence. He may not

claim that because he acted as a reasonable drunk would, that he is not subject to comparative negligence.

That is the full scope and application of the instruction. A voluntarily intoxicated Plaintiff who, as a result of his intoxication, negligently contributes to his own injury is thereby subject to comparative negligence.[13]

SJI2d 13.02 is part of a series of three standard jury instructions, SJI2d 13.01, 13.02, and 13.03. SJI2d 13.01 provides

> One who is ill or otherwise physically disabled is required to use the same degree of care that a reasonably careful person who has the same illness or physical disability would use.

The *Note on Use* indicates that this instruction does not apply to voluntary intoxication or mental illness. It indicates that the appropriate instructions in those cases are SJI2d 13.02 and 13.03. SJI2d 13.01 holds a person with an illness or physical disability to the standard of care for their own safety as is to be expected from a reasonable and careful person with that illness or physical disability. SJI2d 13.02 is in contrast to this and states that, as far as assessing Plaintiff's own conduct for his own safety, voluntary intoxication may not be excused if it has proximately contributed to his own injury. SJI2d 13.03 provides,

> An adult who is disabled by reason of mental illness must still observe the same standard of care which a normal and reasonably careful person would exercise under the circumstances which existed in this case.

This instruction places mental illness in a similar category as voluntary intoxication. It cannot be used to mitigate the requirement that a person conduct himself or herself as a reasonably careful person who is not under the stress of mental illness or voluntary intoxication. The *Comment* on SJI2d 13.03

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[13] Prior to Michigan's adoption of comparative negligence, the intoxicated Plaintiff was subject to contributory negligence and loss of his cause of action.

references Restatement Torts, 2d § 283 B. See discussion, infra, p. 40, re: Restatement Torts 2d, §§283 B and 283 C. Defendant-Appellant argues that if Plaintiff is held to the standard of conduct of a reasonable sober person, then the Defendant's standard of conduct cannot be affected by Plaintiff's intoxication. Yet, Defendant offers no case law to support this position and no valid or persuasive argument in support.

Defendant-Appellant's Arguments

Defendant's first erroneous argument is that SJI2d 13.02 relieves it of any standard of care toward the Plaintiff based on its knowledge of his intoxication. At (p.39) 184b, Defendant's Brief on Appeal, Defendant asks whether Roger Mann should have been warned [of the dangerous condition in the parking lot] because he was drinking. Defendant answers negatively because Plaintiff "was held to the standard of the sober." Here, Defendant has expanded the scope of application of SJI2d 13.02. Instead of limiting the application to the Plaintiff's conduct, Defendant uses the instruction to excuse its own failure to act for the care of its invitee where Defendant knows or should know that the invitee has diminished capability due to drinking. This is simply an incorrect application of SJI2d 13.02.

At (p.38) 183b of its Brief on Appeal, Defendant-Appellant suggests that even had SJI2d 13.02 not been given, the jury could have attributed comparative negligence to Mr. Mann, based on drinking. This appears to be an argument suggesting that SJI2d 13.02 must, therefore, have some other meaning. Defendant's assertion is not correct. It is for the law to state whether Mr. Mann, when voluntarily intoxicated, would be held to the standard of care of a sober person or to the standard of care of a reasonably careful and prudent drunk. In the latter case, he could be excused from comparative negligence if his actions were those of a reasonably careful drunk person under the circumstances. The latter situation may occur in the case of a person who is involuntarily drunk.

The Defendant repeatedly mischaracterizes SJI2d 13.02 as holding Plaintiff to the same standard

as the sober (see, e.g., (p.40) 185b, Defendant's Brief on Appeal) instead of to the standard of care of the sober. The difference lies in to whose conduct the standard applies. Defendant wants it to apply to Defendant's conduct, when it actually applies only to Plaintiff's conduct.

At (pp. 40-41) 185b-186b of its Brief on Appeal, Defendant erroneously argues that the Trial Court increased Defendant's duties to the Plaintiff and decreased Plaintiff's duty for his own care. This argument requires a false unstated assumption. It is that there is a fixed sum of fault that is distributed between Plaintiff and Defendant, so that if the amount of Plaintiff's fault increases, then the amount of Defendant's fault decreases. Defendant has here confused the percentages of fault attributable to Plaintiff and Defendant with the amount of fault attributable to each. The total percentage of fault is a fixed sum, 100%, but the total amount of fault, by whatever numeric or qualitative measure is used, is not.

At (p.42) 187b of its Brief on Appeal, Defendant states that "alcohol is at the very center of whether the cause of action exists or not in the first place." The Defendant is again long on statement, but short on analysis. It is necessary to ask: Would Plaintiff's premises liability cause of action exist in the absence of the dramshop act and given that there is no common law action based on the giving, furnishing or selling of alcoholic liquor. It would. Further, it is necessary to ask: Would Plaintiff have any cause of action against the Defendant once the Plaintiff has left Defendant's land and premises. He would not. Therefore, alcohol is not at the center of existence of Plaintiff's cause of action, but is a collateral fact.

The answer, then, to Issue III(B) is "No."

Law

SJI2d 13.02 is based on long-established law. The comment on the instruction references Strand v The Chicago & West Michigan Ry. Co., 67 Mich 380, 34 NW 712 (1887), Devlin v Morse, 254 Mich 113, 235 NW 812 (1931), and Fors v LaFreniere, 284 Mich 5, 11, 278 NW 743, 745 (1938).

Strand was decided when contributory negligence was the law in Michigan. Strand at 382, 384, 34 NW at 713, 714 approved the following jury instructions:

> 1. It is admitted that the Plaintiff had three double drinks of whiskey that morning, and, if the jury find that he was at all under the influence of liquor, and that this fact contributed to produce the injury, he cannot recover.
>
> 2. If the jury find Strand did not use reasonable diligence in getting off, but, ~~from any cause,~~[14] as from being under the influence of liquor, delayed getting off, and this contributed to the injury of the Plaintiff, he cannot recover.
>
> 3. If the Plaintiff was under the influence of liquor to any extent, so that it hindered or delayed him in getting off, or influenced his judgment in getting off, and his being under the influence of liquor contributed to his injury, he cannot recover.

In these instructions we clearly see the substance of SJI 13.02.

Strand further discussed the duty of the Defendant regarding Plaintiff's intoxication. At 384, 34 NW at 714 Strand states,

> As it was conceded in the case that none of the Defendant's employés knew that Strand had been drinking, they were bound only to use towards him the care and prudence that a sober man would require for his safety.

It is clear that Defendant's knowledge of Plaintiff's drinking does affect the "care and prudence" that Defendant is "bound ... to use towards him." Defendant becomes bound to use toward the Plaintiff the care and prudence for his safety required for a man who had been drinking to the extent known by the Defendant.

Devlin held that a Defendant's drinking can be used to find negligent conduct by Plaintiff. Devlin at 116, 235 NW at 813. Fors held that where Plaintiff had been drinking, there is no negligence of

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[14] The instruction as requested by the Defendant in Strand included the words "from any cause." However, the Supreme Court disapproved of them and stated that they made the instruction incorrect, but that the instruction is correct without the words.

Plaintiff as a matter of law (based simply on drinking), but it is for the jury to determine if the drinking caused a failure to exercise due care. Fors at 10, 278 NW at 745.

Other jurisdictions have expressed similar views, including the view that diminished capability gives rise to a standard of care by Defendant based on its knowledge of the diminished capability in situations where there is a relationship between the parties that imposes upon the Defendant a duty of care toward Plaintiff. Such relationships include common carrier, innkeeper, and possessor of land held open to invitees.

Burke v Chicago & N.W. R.R. Co., 108 Ill App 565, 573 (1903) said,

> It is a general rule that voluntary intoxication will not excuse a person for the failure to use the degree of care reasonably expected of a sober person.

Burke further addressed the relationship to the Defendant's standard of care. Burke quoted from Smith v Norfolk & Southern R.Co., 114 NC 728, 19 SE 863 and 923[15] (1894) which stated in connection with the general rule stated above,

> This is so well established that it would seem unnecessary to cite authority in its court, but, as it appears to be questioned, we will reproduce a few extracts from some of the textbooks, which are substantially repeated by every writer upon the subject. Mr. Wood, in his work on Railways (Vol. 2, Sec. 1457) after stating that one cannot voluntarily incapacitate himself from liability to exercise ordinary care, and then set up such incapacity as an excuse for his negligence, remarks: "The rule, therefore, is that the same care is required of a person when he is intoxicated as when he is sober; though **if the Defendant is aware of his state before the injury, it is bound to exercise greater care to avoid inflicting any injury upon him."**

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[15] The case is split into two parts in the Southeastern Reporter, but not in the North Carolina Reports.

Smith, cited various other authorities.[16]

In describing the duty of a common carrier toward its passenger (which is akin to the duty between a land possessor and his business invitee) Burke said,

> Common carriers are required to do all that human care, vigilance and foresight can reasonably do under the circumstances and consistently with the mode of conveyance employed for the safety of their passengers. [Citations omitted.] The relation of carrier and passenger does not cease with the arrival of the train at the passenger's destination, but the carrier is required to use the highest degree of care and skill reasonably practicable in providing the passenger a safe passage from the train. [Citation omitted.] In P.W. & B. R. Co. v. Anderson, 72 Md. 519, 8 LRA 673, the court said carriers of passengers "are bound to use the utmost degree of care, skill and diligence in everything that concerns the safety of passengers; nor are their duties limited to the mere transportation of them. They are bound to provide safe and convenience modes of access to their trains and departure from them."

Of interest is the common carrier's duty to provide a passenger "safe passage" and "safe and convenient modes of access ... and of departure" from a conveyance. In the instant case, the analogous duty is the Speedboat Bar's duty to provide the Plaintiff Mr. Mann with safe and convenience mode of departure from its premises and land.

Burke quoted from Thompson on Carriers of Passengers, 270, where it said,

> Indeed, it is properly held that it is the duty of the carrier's servants under such circumstances [intoxicated passenger], when aware of the intoxication of the passenger, to give him that degree of attention which considerations for his safety demands **beyond that ordinarily bestowed upon passengers.** (Boldface added.)

The Burke case involved an exception to the general rule that voluntary intoxication does not excuse a person for the failure to use the degree of care reasonably expected of a sober person. The

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[16] These are Patterson's Railway Accident Law (p. 74); Bishop's Non-Contract Law (p. 513); Thompson on Negligence (Vol. 1, p. 430); Shearman & Redfield on Negligence (Vol. 1, p. 93); Pearce on Railroads, 295; Whittaker's Smith on Negligence, 403, note 4; Am. & Eng. Ency. of Law, 79; and Beach on Contributory Negligence (p. 403).

exception arises when the person is so intoxicated that he is helpless and unable to do anything. This is referred to as an exception because in that case, the helpless intoxicated person was shielded from the imposition of contributory negligence that would cut off his cause of action. It is questionable whether the exception would be recognized under principles of comparative negligence.

Rollestone v T. Cassirer & Co., 3 Ga App 161, 175, 59 SE 442, 448 (1907) stated,

> [A]ll courts now hold that the drunk man, so far as his own conduct is concerned, is to be considered, in all matters of volition, judgment, caution, and general mental state, just as if he were sober.
>
> * * *
>
> The physical state produced by drunkenness, is, however, a condition that enters in as one of the circumstances in determining the negligence of the **respective parties** to the transaction. (Boldface added.)

Rollestone continued and stated at 177, 59 SE at 449,

> In determining the negligence of the Defendant, the circumstances that the deceased was drunk, and his condition, mental and physical, so far as disclosed to the Defendant, as so far as under the circumstances the Defendant reasonably should have known, are to be considered.

On the same topic Small v Boston & Maine R.R., 85 NH 330,332, 159 A 298, 300 (1932) stated,

> While an intoxicated person is held to the standard of care of a sober person, **he may be entitled to protection when a sober person would not be.** This is not because of his intoxication, but because of the situation in which his condition has placed him. The law does not thereby give him a better standing than it gives a sober person. (Boldface added.)

A more recent case enunciating the same principles is Wilson v City of Kotzebue, 627 P2d 623 (Alaska 1981). At 630-631, the Supreme Court of Alaska stated,

> The general rule is that voluntary intoxication does not relieve one from liability for the consequences of his intentional or negligent act, and one who becomes intoxicated is held to the same standard of conduct as if he

were sober. [n. 12.][17]

* * *

> [I]f the Defendant has or should have knowledge of the Plaintiff's condition, it may be found negligent if it violated its duty of exercising due care for the Plaintiff's health and safety, for such duty encompasses the duty to prevent reasonably foreseeable acts involving an unreasonable risk of harm. (Emphasis added.)

The principles discussed above relating to diminished capacity of the actor were expressed in Restatement 2d Torts §§283 B and 283 C.

> § 283 B. Mental Deficiency
> Unless the actor is a child, his insanity or other mental deficiency does not relief the actor from liability for conduct which does not conform to the standard of a reasonable man under like circumstances.

> § 283 C. Physical Disability.
> If the actor is ill or otherwise physically disabled, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like disability.

The question of intoxication is addressed by Comment d of § 283 C. It states,

> d. The rule stated in this Section applies to involuntary intoxication, as in the highly unusual case in which one believes that he is drinking tea is plied with liquor and so becomes disabled. Such a case does not differ essentially from that of disability resulting from the administration of a drug. Where, however, the intoxication is voluntary, or where it results from deliberate drinking with knowledge of what is being consumed, so that the result is deliberately risked, the policy of the law has refused to make any allowance for the resulting disability, and the rule stated in this Section is not applied. Such intoxication does not excuse conduct which would otherwise be negligent.
>
> This does not mean that the intoxication is negligence in itself. A drunken man may still act in all respects as reasonably as one who is sober; and if he does so, he is not negligent. If, however, his conduct is not that of a reasonable man who is sober, his voluntary intoxication

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[17] Note 12 in Wilson reads: "*See* W. Prosser, *supra* note 7, § 32 at 154; Restatement (Second) of Torts § 283 C, Comment d (1965)." The edition of Prosser, Torts, being referred to in the note is the 4th Edition, 1971.

does not excuse him from liability.

The law recited above as well as the Restatement all agree with or are consistent with Plaintiff's interpretation of SJI2d 13.02 and Plaintiff's contention that Defendant's knowledge of Plaintiff's condition may impose upon it a standard of care to bestow upon him such care as it need not bestow upon a sober man.

Relationship Between SJI2d 13.02 and SJI2d 19.03.

SJI2d 13.02 relates only, in this case, to the conduct of the Plaintiff. SJI2d 19.03 relates only, in this case, to the conduct of the Defendant. They therefore do not contradict each other.

Relationship Between SJI2d and the Exclusive Remedy Provision of the Dramshop Act.

SJI2d 13.02 relates only, in this case, to the conduct of the Plaintiff after he became intoxicated. Therefore, that conduct cannot give rise to a duty on the part of the Defendant based on any earlier service of alcoholic liquor. Plaintiff's suit relates only to the actions or inaction of the Defendant after the Plaintiff had become intoxicated. Defendant's service of alcohol to the Plaintiff is implicated only insofar as it may in part relate to how Defendant became aware or should have become aware of Plaintiff's intoxicated condition. It is not, however, the source of Defendant's premises duties to the Plaintiff.

There is no relationship, in this case or ever, between SJI2d 13.02 and MCL 436.22(11), the exclusive remedy provision of the Dramshop Act. If the Defendant bar served Plaintiff alcohol and Plaintiff thereby became voluntarily intoxicated, the rule of SJI2d 13.02 applies to the Plaintiff's conduct. MCL 436.22(11) forbids Plaintiff from seeking to impose liability on the bar for serving him liquor. Once Plaintiff leaves Defendant's premises and land without suffering an injury, Defendant owes Plaintiff no duty at all. While still on Defendant's land or premises, Defendant owes Plaintiff the duty owed to an invitee.

If Defendant served Plaintiff liquor, Plaintiff became drunk, but so well masked his drunkenness

that he was not visibly intoxicated, and if, further, there was no reason for Defendant to believe Plaintiff was drunk, then the Plaintiff's intoxication cannot be the source of a duty owed by the bar to the Plaintiff as an invitee.[18]

If the Plaintiff is an invitee on the Defendant's premises and the Defendant knows or should know Plaintiff is drunk and there are circumstances making it foreseeable that because he is drunk, Plaintiff is subject to an unreasonable risk of injury, then Defendant owes Plaintiff a duty to protect, warn, instruct or advise. This is true regardless of why Plaintiff is drunk. What are critical are that Plaintiff is Defendant's invitee, that Defendant knows or should know Plaintiff is drunk, that circumstances are such that there is an unreasonable risk of injury because Plaintiff is drunk and Defendant knows the circumstances.

[18] Nor, for that matter, would the bar have any duty to anyone under the dramshop act since the Plaintiff, in this example, was not visibly intoxicated.

CONCLUSIONS

Plaintiff's premises cause of action is a recognized common law cause of action which arises independent from the selling, giving or furnishing of intoxicating liquor. It would exist even had there never been a dramshop act and given that there is no common law action based on the giving, furnishing or selling of intoxicating liquor. The fact that Defendant served Mr. Mann whiskey and beer is evidence of Defendant's knowledge of Plaintiff's diminished capability due to ingestion of alcohol. Defendant's knowledge, regardless of how acquired, gives rise to the required standard of conduct of Defendant to fulfill its common law duty to protect Mr. Mann while he is on its premises and land held open to him to use as an invitee.

Since the Defendant owed to Mr. Mann premises duties additional to ice and snow duties, the Trial Court properly gave both SJI2d 19.03 and 19.05.

Since SJI2d 13.02 relates solely to the conduct of the Plaintiff, it is independent of the requirements for the conduct of the Defendant under SJI2d 19.03, SJI2d 19.05 or the dramshop act. In this case, the Defendant has no duties under the dramshop act. No duty or part of any duty alleged by Plaintiff against the Defendant requires that the Defendant have served, furnished, sold or given the Plaintiff alcoholic beverages.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff-Appellee requests this Honorable Court to affirm the Decision of the Court of Appeals of November 30, 2001.

Respectfully submitted,

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